Office-Supreme Court, U.S.
FILED
JUN 7 1965
JOHN F. DAVIS, CLERK

In the Supreme Court

of the United States

OCTOBER TERM 1964

No. 229

NATHANIEL E. BERRY,

Plaintiff-Appellant,

v.

STATE TAX COMMISSION,

Defendant-Appellee.

On Appeal from the Supreme Court of the State of Oregon

JURISDICTIONAL STATEMENT

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NATHANIEL E. BERRY,

Plaintiff-Appellant,

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STATE TAX COMMISSION,

Defendant-Appellee.

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JURISDICTIONAL STATEMENT

Appellant appeals from the decree of the Supreme Court of the State of Oregon, entered on December 31, 1964, affirming a decree of the Oregon Tax Court which dismissed appellant's complaint. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

1. *Opinion of Oregon Supreme Court.* The opinion of the Oregon Supreme Court (R. 7) and the dissenting opinion (R. 8) are reported in 79 Or. Adv. Sh. 689, 397 P.2d 780 (1964), and are printed in Appendix A, pp A1 to A8. The opinion denying the petition for rehearing is reported in 80 Or. Adv. Sh. 179, 399 P.2d 164 (1965), and is printed in Appendix A, pp A10 to A11.

2. *Opinion of Oregon Tax Court.* The opinion of the Oregon Tax Court is reported in 1 O.T.C. Adv. Sh. 483 (1964), and is printed in Appendix A, pp A12 to A19.

3. *Opinion of State Tax Commission.* The opinion of the State Tax Commission is not reported but is printed in Appendix A, pp A19 to A24.

JURISDICTION

1. *Nature of the Proceedings.* This suit was brought in the Oregon Tax Court pursuant to ORS 314.460 and 305.410 et seq, to set aside an order of the State Tax Commission which denied appellant, a nonresident taxpayer, personal, nonbusiness deductions from his Oregon income allowed in full to resident taxpayers similarly situated, solely because of such nonresidence, and assessed a deficiency for the tax year 1959. The suit alleged that the arbitrary discrimination violates the Privileges and Immunities and Supremacy Clause of the United States Constitution, the Equal Protection Clause of the Fourteenth Amendment, and the Oregon Admis-

sion Act of Congress. The Oregon Tax Court sustained the order of the State Tax Commission. An appeal was duly taken pursuant to ORS 314.460 and 19.005 et seq, to the Oregon Supreme Court, which by a divided court affirmed the decree of the Oregon Tax Court.

2. *Date of Decree and Appeal.* The decree of the Oregon Supreme Court was dated and entered on December 31, 1964. The order denying appellant's petition for rehearing was dated and entered on February 10, 1965. Notice of appeal to this Court was duly served and filed in the Oregon Supreme Court on March 25, 1965.

3. *Statute Conferring Jurisdiction.* The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2), 69 Stat. 929.

4. *Cases Sustaining Jurisdiction.* The following decisions sustain the jurisdiction of the Supreme Court to hear this appeal: *Shaffer* v. *Carter,* 252 U.S. 37, 48, 40 S. Ct. 221, 64 L. Ed. 445 (1920); *Travis* v. *Yale & Towne Mfg. Co.,* 252 U.S. 60, 73, 42 S. Ct. 106, 66 L. Ed. 239 (1920); *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. 522, 526, 79 S. Ct. 437, 3 L. Ed. 2d 480 (1959); *Wheeling Steel Corp.* v. *Glanders,* 337 U.S. 562, 568, 69 S. Ct. 1291, 93 L. Ed. 1544 (1949).

5. *State Statute Challenged.* The validity of ORS 316.360(1), Vol. 2, p 1157, Oregon Revised Statutes, is involved. The statute is set forth verbatim in Appendix B hereto, p. B4. The section provides that nonresident taxpayers shall not be allowed any of the deductions

from gross income allowed to resident taxpayers similarly situated unless, and only to the extent that, they are connected with income arising from sources within the State of Oregon and taxed to the nonresident taxpayer or connected with property taxed in the State. The statute is construed to deny nonresident taxpayers any personal, nonbusiness deductions, regardless of where incurred.

6. *Constitutional and Statutory Provisions Involved.* The constitutional and statutory provisions involved are the Privileges and Immunities Clause and Supremacy Clause of the United States Constitution, the Equal Protection Clause of the Fourteenth Amendment, Section 4 of the Oregon Admission Act, Act [of Congress] of February 14, 1859, 11 Stat. 383, 384, and certain portions of the Oregon Personal Income Tax Act of 1953, ORS c. 316. The pertinent provisions are set forth in Appendix B, pp B1 to B4.

QUESTIONS PRESENTED

1. Where appellant, a California resident, derives substantially all of his personal income from a trust of real property situated in the State of Oregon, and the State of Oregon taxes all of appellant's income therefrom, but denies appellant any part of the personal, nonbusiness deductions from such income allowed in full to all resident taxpayers similarly situated, solely because appellant is a nonresident taxpayer, does the discrimination and resulting higher tax on appellant, a nonresident proprietor, violate the Privileges and Im-

munities Clause of the United States Constitution, the Equal Protection Clause of the Fourteenth Amendment, and the Supremacy Clause of the Constitution by reason of conflict with the Oregon Admission Act?

2. Where the State of Oregon by statute taxes substantially all of appellant nonresident taxpayer's personal income in the same manner as the personal income of resident taxpayers similarly situated, but prohibits appellant from claiming the same personal, nonbusiness deductions allowed in full to all resident taxpayers, and no showing is made that the discrimination has a fair, reasonable and substantial relation to a permitted end of the taxing government, does the discrimination violate the aforementioned constitutional provisions?

3. Where the State of Oregon discriminates between resident and nonresident taxpayers, similarly situated, in the allowance of personal, nonbusiness deductions on the assumption that nonresident taxpayers get a comparable tax benefit from the state of their residence, without providing relief for nonresident taxpayers when such comparable tax benefits are not in fact given, does such discrimination violate the aforementioned constitutional provisions?

STATEMENT OF THE CASE

1. Statement of Facts

The appellant is, and was during the tax year 1959, a resident of California. His income arising in the State of Oregon was and now is derived from a trust of real property in Klamath Falls, Oregon, established by the appellant's father. All of said income was, and continues to be, taxed by the State of Oregon in the same manner as the income of a resident taxpayer similarly situated. The appellant had no other income from any other source in any state except the sum of $52.42 interest on funds from the said trust deposited in a California bank. All of appellant's income from all sources during 1959 and his income since that year was and continues to be taxed by the State of California. The circumstances existing in 1959 giving rise to this suit have not changed.

The appellee Oregon State Tax Commission disallowed all personal, nonbusiness deductions claimed by appellant on his 1959 Oregon tax return for medical and dental expenses, interest on loans in California, union dues, bank fees, car insurance, and telephone expenses, amounting to in excess of $3,930, and assessed additional income taxes. The deductions were disallowed on the sole ground that the amounts claimed *were not expended to produce income* from sources within the State of Oregon or property having a situs for taxation within that State. It is not disputed that the expenses were incurred in the amounts claimed nor that the deductions would be allowed to a resident of the State of Oregon

similarly situated, whether or not expended in Oregon or elsewhere to produce income.

The decree appealed from strictly relates only to the 1959 tax year. However, the only issue for that year and for the tax years 1960, 1961, and 1962, as to which similar deficiencies have since assessed for the same reason, and for all subsequent tax years, is finally determined by the opinion of the Oregon Supreme Court. Tax warrants have been issued for levy on the Oregon trust property from which appellant derives his income and sustenance.

Appellant claimed before the State Tax Commission that the statute (ORS 316.360) as applied to him violated the Oregon and United States Constitutions. Appellant's administrative appeal was denied. Thereafter appellant *in propria persona* petitioned to have the case reopened and testimony taken on appellant's inability to come to and establish residence in Oregon and on the sources of appellant's income. The petition was denied. On November 23, 1962, appellant by certified letter to the State Tax Commission offered to amend his tax return for 1959 and all subsequent years and to pay taxes to the State of Oregon on all income which he had received from all other states. The State Tax Commission ignored the petition.

Thereupon the appellant commenced suit in the Oregon Tax Court *in propria persona*. Appellant's complaint and supplemental complaint and appellee's motions and demurrers thereto were, in effect, set aside at the time of trial, and the case was submitted to the Oregon Tax

Court on stipulated facts and three issues of law formulated by the Oregon Tax Court and counsel, substantially as set forth and followed in the briefs submitted to that court and to the Oregon Supreme Court. The Oregon Tax Court did not rule on the motions and demurrers but sustained the order of the State Tax Commission on all grounds and dismissed appellant's complaint. The Oregon Supreme Court affirmed the decree of the Oregon Tax Court on all grounds, two justices dissenting, and later denied appellant's petition for rehearing.

2. Manner of Raising Federal Questions

a. *Before the State Tax Commission.* The federal questions were raised before the State Tax Commission Commission by appellant's Claim for Abatement of Tax and brief, which alleged as follows:

> "ORS 316.360 disallowing certain deductions in case of non-resident tax payers violates the following constitutional provisions: * * * (2) Article IV, Section 2, of the Constitution of the United States, * * * (3) Amendment V to the Constitution of the United States, * * * and (4) Amendment XIV, Section 1, to the U. S. Const. * * *." (See Tax Commission opinion, A21).

The Tax Commission rejected the contentions of appellant (A 24).

b. *In Oregon Tax Court.* The federal questions were raised in the Oregon Tax Court by appellant's complaint and supplemental complaint *in propria persona* (R. 1, 2), by the agreed Stipulation of Facts (R. 3), and

by stipulation of the issues, followed in the briefs and the opinion of the Oregon Tax Court. (1 O.T.C. Adv. Sh. 483, 487 (1964); A. 17). The issue was stated by the court as follows:

> "A third issue is whether, as interpreted by the commission and this court, ORS 316.360 denies to nonresidents the guaranties of the Oregon Constitution, Art I, Secs 20 and 32, the United States Constitution, Art IV, Sec 2 and the XIV amendment, Sec 1, and the Oregon Admissions Act."

The court held in its opinion "that such interpretation of ORS 316.360 violates neither the Oregon Constitution nor the Oregon Admissions Act nor the Federal Constitution." (1 O.T.C. Adv. Sh. 483, 489, A. 19).

c. *In Oregon Supreme Court.* In the Oregon Supreme Court all federal questions were duly raised by the assignment of error in Appellant's Abstract of Record and Brief (pp 5, 7-8, R. 5) as follows:

> "The Tax Court erred in sustaining the order of the State Tax Commission which denied plaintiffs' nonbusiness deductions claimed on their 1959 Oregon income tax return for the reasons that * * * (3) it applied ORS 316.360 in an unreasonable and discriminatory manner in violation of the Oregon and United States Constitutions and the Oregon Admissions Act."

Point No. 3 of the assignment of error (pp. 20-21, R. 5) specified the sections of the Constitution involved. The Appellants Petition for Rehearing and Brief also raised the federal questions (p. 1, R. 10). The majority of the court held in its opinion that the statute in ques-

tion did not violate the United States Constitution (79 Or. Adv. Sh. 689, 692, 397 P.2d 780, 782 (1964); A5; R7). The dissenting justices believed that the statute did violate the Constitution. (79 Or. Adv. Sh. 689, 696, 397 P.2d 780, 784; A8, R8). The court did not mention the Oregon Admission Act and apparently accepted the opinion of the Tax Court on that issue (1 O.T.C. Adv. Sh. 483, 487-88; A18).

3. The Federal Questions are Substantial.

The statute in question, ORS 316.360, on its face and in its intended and actual effect, discriminates between resident and nonresident taxpayers solely because of the fact of nonresidence, and it taxes nonresident proprietors at a higher effective rate than resident proprietors, in direct contravention of the Oregon Admission Act. The State Tax Commission admitted that the classification is patently unrational and unfair, it is palpably arbitrary, and no basis for the discrimination having a fair, reasonable and substantial relation to a valid legislative purpose has been shown or suggested.

For these reasons the statute violates the Privileges and Immunities and Supremacy Clauses of the United States Constitution, and the Equal Protection Clause of the Fourteenth Amendment. The statute and the opinion of the Oregon Supreme Court sustaining it are in direct conflict with the following decisions of this Court: *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. 60, 77-78, 40 S. Ct. 228, 231, 64 L. Ed. 460, 468-69 (1920); *Wheeling Steel Corp.* v. *Glanders*, 337 U.S. 562, 574, 69 S. Ct. 1291, 1298, 93 L. Ed. 1544, 1552 (1949); *Mullaney*

v. *Anderson,* 342 U.S. 415, 418, 72 S. Ct. 428, 430, 96 L. Ed. 458, 462 (1952). Cf. *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. 522, 527, 533, 79 S. Ct. 437, 441, 444, 3 L. Ed. 2d 480, 485, 488 (1959).

This appeal presents a substantial question under the Supremacy Clause not previously considered by this Court. At the time Oregon was admitted to the Union, Congress adopted legislation expressly designed to prevent discrimination imposed by the State of Oregon on nonresident proprietors or landholders. The Oregon Admissions Act, Act of February 14, 1859, 11 Stat. 383, the Act of Congress admitting Oregon into the Union, imposed as a condition to admission that the people of the State of Oregon must agree by an irrevocable ordinance never to tax nonresident proprietors higher than residents. (Sec. 4 of the Act, 11 Stat. 384). This condition was expressly accepted by the State of Oregon. Section 1 of Act of June 3, 1859, First Extra Session, 29, Deady's Laws, 1866, 132, Vol. 5, p. 1169, Oregon Revised Statutes.

The Supremacy Clause, Art. VI, Cl. 2, United States Constitution, provides that such act of Congress is the supreme law of the land. ORS 316.360 clearly is in conflict with the act of Congress, since the denial to nonresident taxpayers of personal, nonbusiness deductions allowed to resident taxpayers necessarily results in a higher tax on the nonresident taxpayer over resident taxpayers similarly situated.

The Oregon Tax Court held that there was no such conflict because "* * * on his own personal income as an

individual in his nonproprietary capacity, a nonresident may be taxed differently than a resident without violating the Admissions Act." 1 O.T.C. Adv. Sh. 483, 488; A 18). The Oregon Supreme Court in effect so held by affirming the decree of the Tax Court, since the issue was duly raised and presented. (See pp. 8-9 herein; R. 5, 6). The Tax Court's construction of the Oregon Admission Act is clearly erroneous, unduly restricts the purpose of the act of Congress to protect landholders in Oregon, and conflicts with the analogous decisions of this Court under the Privileges and Immunities and Equal Protection Clauses.

Article IV, Section 2, Clause 1 of the United States Constitution provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Section 1 of the Fourteenth Amendment provides in part that no state "* * * shall deny to any person within its jurisdiction the equal protections of the laws."

This Court has clearly established the following principles limiting the tax power of the states pursuant to those constitutional provisions:

a. The state cannot discriminate between resident and nonresident taxpayers solely because of the different residence of the taxpayer. *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. 60, 77-78, 40 S. Ct. 228, 231, 64 L. Ed. 460, 468-69 (1920); *Wheeling Steel Corp.* v. *Glanders*, 337 U.S. 562, 572, 69 S. Ct. 1291, 1297, 93 L. Ed. 1544, 1551 (1949); *Mullaney* v. *Anderson*, 342 U.S. 415, 418, 72 S. Ct. 428, 430, 96 L. Ed. 458, 462 (1952).

b. "The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' [Cases omitted.]" *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. 522, 527, 79 S. Ct. 437, 441, 3 L. Ed. 2d 480, 485 (1959). The appellee has conceded this premise. (Resp. Br. in Oregon Supreme Court, R 6, pp. 24, 25, 31, 32).

c. Ordinarily a state policy "to favor its own residents, to increase their prosperity at the expenses of outlanders, to protect them from, and give them an advantage over, 'foreign' competition" violates the Constitution, even if the policy is rational, where the discrimination is against nonresident taxpayers. See *Allied Stores of Ohio, Inc.* v. *Bowers, supra,* concurring opinion of Mr. Justice Brennan, 358 U.S. at 533, 79 S. Ct. at 444, 3 L. Ed. 2d at 488. Accord: *Mullaney* v. *Anderson, supra,* 342 U.S. at 418, 72 S. Ct. at 430, 96 L. Ed. at 462.

d. A state cannot adopt a discriminatory tax scheme in order to force other states into an interstate system of reciprocity unless that state itself provides a mechanism, such as by tax credits, to eliminate the unfair effect of such discrimination when other states do not go along. *Wheeling Steel Corp.* v. *Glanders, supra,* 337 U.S. at 573-74, 69 S. Ct. at 1297-98, 93 L. Ed. at 1552; *Travis* v. *Yale & Towne Mfg. Co., supra,* 252 U.S. at 81-82, 40 S. Ct. at 232-33, 64 L. Ed. at 470.

e. The rational basis or substantial differences jus-

tifying the discrimination must appear or be shown where the statute is, on its face, discriminatory. The "bald assertion" of a reasonable relation is not sufficient, and "validity is not established by the mere imposition of a tax." *Mullaney* v. *Anderson, supra,* 342 U.S. at 418, 78 S. Ct. at 430, 96 L. Ed. 462. Accord: *Wheeling Steel Corp.* v. *Glanders,* 337 U.S. at 572, 69 S. Ct. at 1297, 93 L. Ed. at 1551.

The pertinent part of ORS 316.360, Vol. 2, p. 1157, Oregon Revised Statutes (B4) is as follows:

> "(1) Subject to subsection (2) of this section, in the case of a nonresident taxpayer the deductions allowed by ORS 316.305 to 316.350 shall be allowed only if and to the extent that they are connected with:
>
> (a) Income which arises from sources within the State of Oregon and which is taxed to a nonresident taxpayer under this chapter; or
>
> (b) Property having a situs for taxation within the State of Oregon."

The statute is construed to prevent any nonresident taxpayer from claiming any personal, nonbusiness deductions from his Oregon income on the ground that the only allowable deductions to nonresidents are those expended to produce the Oregon income. (1 O.T.C. 483, 484; A 15). An Oregon resident is allowed such deductions as medical expenses, casualty losses and property taxes wherever incurred, even though unrelated to the production of income, whereas a nonresident is not allowed such expenses even if incurred in Oregon or for taxes on or loss of Oregon property. The sole exception,

which illustrates the intentional discrimination, is the allowance to nonresident taxpayers of a deduction for charitable contributions to the United States or to an Oregon charitable organization. ORS 316.360 (2). (B4). (See examples given by Tax Commission in its Legal Department Memo, A26-27 herein).

In a prior case, the State Tax Commission frankly admitted that the discrimination under ORS 316.360 (1) "seems patently unrational as well as unfair, * * *." (A27). The Oregon Supreme Court could not suggest any rational basis for the discrimination, as the dissenting opinion clearly showed. (79 Or. Adv. Sh. 689, 695, 397 P.2d 780, 783; A3). Far from suggesting any real ground of difference between resident and nonresident taxpayers justifying the denial of personal, nonbusiness deductions to nonresidents, the Oregon Supreme Court merely suggested that such a statutory scheme may have seemed a good idea to a legislature concerned with the tax problems created by interstate investors and commuters. (79 Or. Adv. Sh. 689, 691-92, 397 P.2d 780, 782 (1964); A4, 5). Since the Oregon statute provides no tax credit where other states do not cooperate, that method of seeking reciprocity is invalid. See the discussion of the *Wheeling Steel Corp.* and *Travis* cases, p. 13 herein. The result is that appellant and other nonresident taxpayers like him bear more than their share of the tax burden of the State of Oregon, without the protection of representation in the legislature, the situation abhorred in the concurring opinion in *Allied Stores of Ohio, Inc.* v. *Bowers, supra,* 358 U.S. at 534, 79 S. Ct. at 444, 3 L. Ed. 2d at 488.

The real reason for the Oregon Supreme Court's decision, apart from an innate desire to protect the state coffers, was that it felt bound by the fact that an appeal from a similar New York decision, *Goodwin* v. *State Tax Commission,* 286 App. Div. 694, 146 N.Y.S.2d 172 (1955), affirmed without comment, 1 N.Y.2d 680, 133 N.E.2d 711 (1956), was dismissed by this Court for want of a substantial federal question in 1956, without other comment. 352 U.S. 805, 77 S. Ct. 47, 1 L. Ed. 2d 38 (1956). The New York intermediate court in the *Goodwin* case based its decision on an erroneous interpretation of dictum in the *Travis* case, *supra,* 252 U.S. at 76, 40 S. Ct. at 230, 64 L. Ed. at 468. The reasons and policy grounds given by the New York court are without foundation, they conflict with this Court's decisions in the *Travis, Wheeling Steel Corp.* and *Mullaney* cases, *supra,* and are inconsistent with the Court's language in the *Allied Stores of Ohio* case, *supra.* In particular the policy reasons for allowing personal, nonbusiness deductions only to resident taxpayers suggested by the New York Court in the *Goodwin* case are repudiated by the concurring opinion in *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. at 533, 79 S. Ct. at 444, 3 L. Ed. 2d at 488.

The *Goodwin* case in this Court is distinguishable from the present case. It did not involve a direct conflict with an act of Congress and the Supremacy Clause, as does this case. It did not involve an involuntary participant in the affairs of the taxing state, as in this case, where appellant has no power to change the situs of his income. The Court did not have presented to it the de-

cisions in the *Wheeling Steel Corp.* and *Mullaney cases, supra,* and the Court had not yet decided *Allied Stores of Ohio, Inc.* v. *Bowers, supra.* These cases cast a very different light on the constitutional questions than the barren opinion of the New York court in the *Goodwin* case.

For some of these reasons, all of which we believe to be sound and important, the dissenting justices in the Oregon Supreme Court did not believe that the decisions of this Court had foreclosed further examination of the federal constitutional problem. (79 Or. Adv. Sh. at 693, 397 P.2d at 782; A5). The dissenting justices reexamined the dictum in the *Travis* case, the asserted distinction between flat sum exemptions and itemized personal deductions, and the supposed policy considerations, and concluded that "the statute is invalid insofar as it denies to nonresidents any personal deductions although they have no relation to the production of income." (79 Or. Adv. Sh. at 696, 397 P.2d at 782-3; A-8).

The reasoning of the New York court and its analysis of the *Travis* case dicta has been treated as the law of the land by some courts, including the Oregon Supreme Court, because of this Court's summary treatment of that appeal. The asserted approval by silence includes a statement by the New York court of its belief that the *Travis* case holding would not be followed today if it were considered anew by this Court. (286 App. Div. 694, 703, 146 N.Y.S.2d 172, 181-82). That belief undoubtedly emboldened the court to confine the effect of the *Travis* case strictly to discrimination in the al-

lowance of flat sum personal exemptions. Such distinction is meaningless for constitutional purposes. This Court should not permit the self-serving opinion of an intermediate New York court to stand as the law of the land, but should re-examine and reaffirm the true meaning of the *Travis* case in light of the more recent decisions of this Court, discussed above. (pp. 12-14 herein).

In 1920 this Court decided *Shaffer* v. *Carter,* 252 U.S. 37, 40 S. Ct. 221, 64 L. Ed. 445 (1920) and *Travis* v. *Yale & Towne Mfg. Co.,* 252 U.S. 60, 40 S. Ct. 228, 64 L. Ed. 460 (1920) on the same day. Mr. Justice Pitney wrote both opinions. The *Shaffer* case was solely concerned with the claim of a nonresident oil man doing a very large business in Oklahoma that Oklahoma had no power to tax his Oklahoma source income at all. The Court naturally rejected that claim. At that time Oklahoma allowed personal exemptions to residents and nonresidents alike, unlike New York, but it did attempt to allocate business expenses to the related income. While no actual losses were claimed by the taxpayer, the Court did note in dictum, in response to his broad attack on the constitutionality of the statute, that the state rationally could allow deductions of losses only from the income to which the losses related in the case of a nonresident taxpayer. (252 U.S. at 57, 40 S. Ct. at 227, 64 L. Ed. at 458-59). At no place in the record or in the Court's opinion is the problem of personal, nonbusiness deductions raised or considered at all. That is understandable since the record showed that the Oklahoma statute, Sec. 6, c. 164, Laws of 1915, at that time did not

allow such nonbusiness deductions as medical expense even to resident taxpayers. However, Oklahoma now allows nonresident taxpayers a proportionate deduction for medical expenses. 68 Okl. Stat. Ann. Sec. 880(j).

The *Travis* case involved a New York company seeking to avoid withholding New York income taxes from salaries paid to employees who commuted from out-of-state. This Court held the statute unconstitutional because the personal exemption allowed to resident taxpayers was not allowed to nonresident taxpayers. That holding has been consistently followed by state courts. E. g. *State* v. *Ashley,* 73 N.M. 267, 387 P.2d 588 (1963). Compare ORS 316.365, which allows the standard deduction to nonresidents, with ORS 316.455, which apparently allows the personal exemption only to residents, despite the *Travis* holding.

Since no actual deductions or exemptions were claimed in the *Travis* case, the constitutional issues were dealt with hypothetically. The discrimination in allowance of flat sum exemptions needed no actual taxpayer to raise the question, since the flat sum is allowed without proof of actual expenses. In a passing reference to itemized deductions, (252 U.S. at 75-76, 40 S. Ct. at 230, 64 L. Ed. at 468) the Court noted: "That there is no unconstitutional discrimination against citizens of other states in confining the deduction of expenses, losses, etc., in the case of non-resident taxpayers, to such as are connected with income arising from sources within the taxing State, * * *" is settled by the Court's decision the same day in *Shaffer* v. *Carter, supra.* However, the New York statute at that time did not allow deductions

for such personal expenses as medical expenses even to resident taxpayers, and, of course, none were claimed. Furthermore, the *Shaffer* case dictum clearly related only to business-connected losses, as shown above.

It seems clear that the implications of the dictum in the *Travis* case for a fact situation like the *Goodwin* case or the present case were not considered at all by the Court. In fact the chief draftsman of the New York statute stated that the case where the income of a nonresident taxpayer was almost wholly earned in New York was not contemplated by the law—rather, the draftsmen looked forward to the speedy adoption of comparable laws in adjoining states. (Professor Seligman, quoted in Record of *Travis* case, Docket #548, Volume 99 at p. 40). This hope and policy was expressly rejected by the Court in the *Travis* case by direct reference to that passage. 252 U.S. at 81-82, 40 S. Ct. at 232-33, 64 L. Ed. at 470. Accord: *Wheeling Steel Corp.* v. *Glanders, supra,* 337 U.S. at 573-74, 69 S. Ct. at 1279-98, 93 L. Ed. at 1552.

It is interesting to note that the same draftsman suggested that the inequality in such a case could be eliminated by allowing the nonresident to file a declaration of his entire income from all sources and grant him such proportion of the statutory exemption as his income within the state bears to his entire income. That is what appellant sought to do in this case with his nonbusiness deductions, and which Oklahoma now seems to allow as to medical expenses. 68 Okl. Stat. Ann. 880(j). (App. Br. in Oregon Supreme Court, R. 5, p. 13; 79 Or.

Adv. Sh. at 693, 397 P.2d at 782). In fact, appellant offered to allow the State of Oregon to tax all of his income from all sources (Ex. 3, R. 4).

4. Conclusion

Since the State Tax Commission has admitted that the discrimination here involved is patently unrational and unfair, it is difficult to see how the discrimination can be allowed to stand. The question is important because it is a general and intentional scheme of the Oregon legislature as well as of some other states to reach precisely that result. The statute is directly in conflict with decisions of this Court and is, on its face, in violation of the federal constitutional provisions and the act of Congress referred to. The refusal of the Oregon Supreme Court to suggest any reasonable and substantial basis for the discrimination undermines the tests of fairness laid down by this Court. The opinion of the New York court in the *Goodwin* case should not be taken for the considered opinion of this Court, particularly when that opinion casts doubt upon the present validity of a prior holding of this Court. If the *Goodwin* opinion is allowed to stand, state courts may begin to sustain the denial of personal exemptions to nonresident taxpayers, in direct conflict with the *Travis* holding, since some of the states, like Oregon, still retain that particular discrimination by statute. The state courts will strike down such discrimination only if they think the *Travis* case is still the law of the land.

The federal questions presented by this appeal are

substantial and of public importance; some have not previously been argued before or decided by this Court, and they require plenary consideration, briefs on the merits and oral argument.

Respectfully submitted,

ROBERT N. GVAL,
Attorney for Appellant
1430 American Bank Bldg.,
Portland, Oregon 97205.

Portland, Oregon
June 4, 1968

APPENDIX A

1. Opinion of Supreme Court of Oregon (79 Or. Adv. Sh. 689, 397 P.2d 780)

No. 7766—December 31, 1964

IN THE SUPREME COURT OF THE STATE OF OREGON

IN BANC

BERRY, ET UX, *Appellants*, v. STATE TAX COMMISSION, *Respondent*.

Appeal from Oregon Tax Court.

PETER GUNNAR, Judge.

Argued and submitted November 4, 1964.

Robert N. Gygi, Portland, argued the cause for appellants. With him on the brief were Keane, Haessler, Bauman and Harper, Portland.

John C. Mull, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Robert Y. Thornton, Attorney General, and Caglisle B. Roberts, Assistant Attorney General, Salem.

Before MCALLISTER, Chief Justice, and PERRY, SLOAN, O'CONNELL, GOODWIN, DENECKE and LUSK, Justices.

AFFIRMED.

GOODWIN, J.

The plaintiffs appeal from a decree of the Oregon Tax Court which denied them a refund of part of the

state income tax which they paid for 1959. The plaintiffs are husband and wife, and at all material times were residents of California. The opinion of the Tax Court is reported in 1 OTC Adv Sh 483 (1964).

The State Tax Commission denied the taxpayers certain personal deductions. The claimed deductions were for medical expenses, interest on loans in California, and other similar personal items. During the year covered by their 1959 tax return, the taxpayers received income from a trust of real property in Oregon. No part of the deductions represented expenditures connected with the production of the Oregon income or with Oregon property. The agreed statement of facts indicated that the income was not dependent upon the health or earning power of the taxpayers. We leave open, therefore, the question whether or not in a proper case medical expenses might be "connected with" income.

The relevant parts of ORS 316.360 provide:

> "(1) Subject to subsection (2) of this section, in the case of a nonresident taxpayer the deductions allowed by ORS 316.305 to 316.350 shall be allowed only if and to the extent that they are connected with:
>
> "(a) Income which arises from sources within the State of Oregon and which is taxed to a nonresident taxpayer under this chapter; or
>
> "(b) Property having a situs for taxation within the State of Oregon."

The taxpayers contend that the foregoing statute denies them the equal protection of the laws and the

equal privileges and immunities guaranteed by the Fourteenth Amendment and by Article IV, § 2, of the Constitution of the United States. The statute is said to be unconstitutional because nonresidents are not permitted to deduct certain amounts from their personal income taxes which residents of Oregon are permitted to deduct from their personal income taxes.

In upholding the right of the State of Oklahoma to tax a nonresident upon income earned within Oklahoma while denying him the right to deduct losses which Oklahoma residents could have deducted, the United States Supreme Court said in a dictum that the state regulations did not violate any federal constitutional right. Shaffer v. Carter, 252 US 37, 40 S Ct 221, 64 L Ed 445 (1920). The *Shaffer* dictum was approved and reiterated in Travis v. Yale & Towne Mfg. Co., 252 US 60, 40 S Ct 228, 64 L Ed 460 (1920). The *Shaffer* and *Travis* dicta do not appear to have been questioned or weakened by any holding of the Supreme Court, and are treated in some of the law reviews as law. See Solomon, *Nonresident Personal Income Tax: A Comparative Study in Eight States,* 29 Fordham L Rev 105, 140 (1960), and Culp, *Selected Problems in Multistate Taxation,* 44 Iowa L Rev 280 (1959).

It has been held that the privileges-and-immunities clause bars discrimination based solely upon residence, but does not preclude disparity of treatment where there are independent reasons for it. Thus, the inquiry in each case is whether the degree of discrimination bears a close relation to the reasons, apart from residence, which a state legislature may have had in enact-

ing an apparently discriminatory law. Toomer v. Witsell, 334 US 385, 396, 68 S Ct 1156, 92 L Ed 1460 (1947).

The statute in question does not discriminate against nonresidents because they are nonresidents. Rather it is part of a statutory scheme that recognizes the tax problems created by interstate investors and commuters. (See, for similar legislation, Calif. Rev. & Tax. Code § 17307.) Like the legislatures of other states, the Oregon Legislative Assembly may have been of the opinion that personal deductions are so closely related to the state of residence that they should be allowed only by the state of residence and not by every other state in which some part of a taxpayers' income might be found and taxed. The wisdom of such a legislative policy is a matter for legislative, rather than judicial, decision. For a discussion of such legislation, see Hellerstein, State and Local Taxation 548 (2d ed 1961).

The Tax Court correctly looked to the decisions of the United States Supreme Court for guidance in the application of the United States Constitution to the power of a state to tax income earned within that state. In holding that the Oregon statute does not offend the federal Constitution, the Tax Court followed the only authority available, i.e., *Shaffer* v. *Carter* and *Travis* v. *Yale & Towne Mfg. Co.* In Matter of Goodwin v. State Tax Comm., 286 App Div 694, 146 NYS2d 172 (1955), affirmed without opinion, 1 NY2d 680, 133 NE2d 711, dismissed for want of a substantial federal question, 352 US 805, 77 S Ct 47, 1 L Ed2d 38 (1956), the New York court decided a similar question in the

same way. We agree that the authorities do not support the taxpayers' contention on the federal constitutional questions.

The Tax Court also held that the statute does not offend the Oregon Constitution. Article I, § 20, of that constitution contains the "equal privileges and immunities" clause, which does not purport to deal with the rights of nonresidents. See Alsos v. Kendall et al., 111 Or 359, 227 P 286 (1924). Article I, § 32, requires all taxation to be uniform within a given class. Equality within a class is all that is necessary. McPherson v. Fisher, 143 Or 615, 23 P2d 913 (1933). Under the special circumstances of multistate taxation, residence is a proper classification for allowing or disallowing personal deductions in the administration of a state income tax. Matter of Goodwin v. State Tax Comm., supra.

Finally, the Tax Court rejected the taxpayers' contention that the taxpayers ought to be allowed to prorate their personal deductions against their Oregon income in the same ratio that their total income bears to their Oregon income. The Tax Court correctly left such a proposal to the legislature. We do not pass upon the merits of the proposal. It simply cannot be read into the existing law.

Affirmed.

2. Dissenting Opinion, Supreme Court of Oregon

DENECKE, J., dissenting.

The majority is of the opinion that the decisions of the United States Supreme Court have foreclosed any

further examination of the federal constitutional problem. With this I respectfully disagree.

Shaffer v. Carter, 252 US 37, 40 S Ct 221, 65 L ed 445 (1920), held that Oklahoma could tax the income of a nonresident earned within Oklahoma. The opinion also stated that the state did not have to accord nonresidents a deduction "by reason of losses elsewhere incurred." (253 US at 57) Whether the court was referring to business-connected losses is unclear. The court remarked that there was no showing that the taxpayer had sustained any losses. The most reasonable interpretation of the language is that "losses" referred to those incurred in business. This is concluded because the reasoning of the court was that as long as a nonresident could only be taxed upon income produced in the state, he could only deduct losses occurring in the state; a resident is taxed upon all income, wherever produced, therefore, he should be permitted to deduct all losses, wherever incurred.

Travis v. Yale & Towne Mfg. Co., 252 US 60, 40 S Ct 228, 64 L ed 460 (1920), held a New York statute to be contrary to the Equal Protection Clause of the Constitution because it did not allow personal exemptions to nonresidents. The court also commented that a state could confine deductions for "expenses, losses, etc., in the case of non-resident taxpayers, to such as are connected with income arising from sources within the taxing State * * *." (252 US at 75-76) Again, what "expenses, losses, etc." the court had in mind is unknown.

Mr. Justice Pitney wrote both decisions and I find

it impossible to determine whether the opinions referred to business losses and expenses or personal expenses.

The New York Court in In Matter of Goodwin v. State Tax Comm., 286 App Div 694, 146 NYS2d 172 (1955), held valid a New York statute similar to the Oregon statute here at issue. It believed that Mr. Justice Pitney was referring to personal expenses, as well as business expenses. Apart from reliance upon the two United States Supreme Court decisions, the New York court attempted to advance other reasons for upholding the New York statute. I cannot agree with its reasoning. The Oregon Tax Court, however, believed the reasoning in the *Goodwin* case to be correct and based its decisions thereon.

In order to treat nonresidents differently from residents, "[t]he State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary." Allied Stores of Ohio, Inc. v. Bowers, Tax Comm., 358 US 522, 527, 79 S Ct 437, 3 L ed 2d 480 (1959). What is the "rational basis" for differentiating between nonresidents and residents, other than their place of residency, which admittedly is insufficient? If any of the deductions have any possible connection to income, differentiation is valid as it is based upon the "rational basis" that only the nonresident's income produced within the state is taxable, whereas all of a resident's income, wherever produced, is taxable. The parties here have stipulated that the deductions claimed were "personal deductions." While this does not necessarily mean they had no relation to income, I assume

this is the fact and the Commission makes no contrary contention.

The largest deduction, that for medical expense, will be considered typical. Perhaps it may be contended that there is a distinction in that medical expenses of a resident will be spent in the state and those of a nonresident out of the state. That can have no merit because the purpose of the deduction for medical expense is to relieve from taxation an unexpected, almost catastrophic, expenditure analagous to a casualty loss deduction. The purpose is not to encourage the expenditure of funds on Oregon medical services. It has been suggested that a nonresident may take the deduction twice, on his Oregon return and on his own state's return. However, this same possibility exists with respect to personal exemptions, yet personal exemptions must be granted residents and nonresidents alike.

The Commission has suggested no "rational basis" for distinction and I can think of no other possibility than those just discussed. In my opinion, the allowance of these personal deductions is similar to the allowance of the personal exemptions. The Commission distinguishes exemptions from deductions on the ground that exemptions do not necessarily involve expenditures. This is true. However, I cannot see why this is material upon the issue of equal protection.

In my opinion the statute is invalid in so far as it denies to nonresidents any personal deductions although they have no relation to the production of income.

O'Connell, J., joins in this dissent.

3. Decree of the Supreme Court of Oregon

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the courtroom in the city of Salem on the first Monday, the 5th day of OCTOBER, 1964, WHEREUPON on this THURSDAY, the 31st day of DECEMBER, the same being the 31st judicial day of said term, there were present:

Wm. M. McAllister, Chief Justice
George Rossman, Associate Justice
William C. Perry, Associate Justice
Gordon W. Sloan, Associate Justice
Kenneth J. O'Connell, Associate Justice
Alfred T. Goodwin, Associate Justice
Arno H. Denecke, Associate Justice, and
F. M. Sercombe, Clerk.

when the following proceedings were had:

NATHANIEL E. BERRY and FLORENCE E. BERRY, Appellants, v. STATE TAX COMMISSION, Respondent	APPEAL FROM OREGON TAX COURT

This cause on November 4, 1964, having been duly argued and submitted upon and concerning all questions arising upon the record and then reserved for further consideration, and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is not error as alleged.

IT THEREFORE IS CONSIDERED, ORDERED and DECREED that the decree of the court below rendered and entered in this cause be and the same hereby is in all things affirmed.

Undertaking on appeal having been waived by stipulation of the parties herein,

IT THEREFORE IS ORDERED that respondent have and recover of and from appellants its costs and disbursements in this court taxed at $163.00.

IT FURTHER IS ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to enter a decree in accordance herewith.

4. Opinion on Petition for Rehearing (80 Or. Adv. Sh. 179, 399 P.2d 164)

No. 7802—February 10, 1965

IN THE SUPREME COURT OF THE STATE OF OREGON

IN BANC

BERRY ET UX, *Appellants, v.* STATE TAX COMMISSION, *Respondent.*

Appeal from Oregon Tax Court.

PETER GUNNAR, Judge.

On appellant's petition for rehearing filed January 25, 1956. Former opinion filed December 31, 1964. 79 Or Adv Sh 689, 397 P2d 780.

Robert Neil Gygi and Keane, Haessler, Bauman and Harper, Portland, for the petition.

Before McALLISTER, Chief Justice, and PERRY, SLOAN, O'CONNELL, GOODWIN, DENECKE and LUSK, Justices.

PETITION FOR REHEARING DENIED.

GOODWIN, J.

In a petition for rehearing the taxpayers have objected to our citation of *Alsos v. Kendall et al,* 111 Or 359, 366, 227 P 286 (1924) for dictum to the effect that Oregon Constitution, Art I, § 20, does not purport to deal with the rights of nonresidents. The statement was not necessary to the decision in *Alsos* v. *Kendall,* and it is not necessary to the decision in the case at bar. The statement admits of a construction that is broader than we intended to give to it, and it should be withdrawn. In all other respect we adhere to our former opinion.

Rehearing denied.

5. Order Denying Petition for Rehearing

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the courtroom in the city of Salem on the first Monday, the 5th day of OCTOBER, 1964, WHEREUPON on this WEDNESDAY, the 10th day of FEBRUARY, 1965, the same being the 51st judicial day of said term, there were present:

Wm. M. McAllister, Chief Justice
William C. Perry, Associate Justice
Gordon W. Sloan, Associate Justice
Kenneth J. O'Connell, Associate Justice

Alfred T. Goodwin, Associate Justice
Arno H. Denecke, Associate Justice
Ralph M. Holman, Associate Justice, and
F. M. Sercombe, Clerk,

when the following proceedings were had:

NATHANIEL E. BERRY and FLORENCE E. BERRY, Appellants v. STATE TAX COMMISSION, Respondent	)	APPEAL FROM OREGON TAX COURT

The court having duly considered the petition for rehearing of the appellants herein, and the court being fully advised therein,

IT HEREBY IS ORDERED that said petition be and the same hereby is denied, by written opinion of the court.

6. Opinion of Oregon Tax Court (1 O.T.C. Adv. Sh. 483)

IN THE OREGON TAX COURT

INCOME TAX

No. 56

NATHANIEL E. BERRY and FLORENCE E. BERRY, Plaintiffs, v. STATE TAX COMMISSION, Defendant.

DECISION

This is a suit to set aside State Tax Commission Opinion and Order No. I-62-27, which denied plaintiffs' nonbusiness deductions for medical expenses, payment of interest on loans in California, union dues, bank fees, car insurance, and telephone expense.

Throughout 1959, plaintiffs were, and they still are, residents of California. On their 1959 Oregon income tax return plaintiffs declared Oregon source gross income of $7,241.48, derived from a trust of real property in Oregon. Their only non-Oregon source income amounts to $52.42 in interest on a savings account in California. On their return plaintiffs claimed nonbusiness deductions for medical expenses, interest paid on loans in California, union dues, bank fees, car insurance and telephone expense in an aggregate amount of $4,041.60. Defendant disallowed the deductions to plaintiffs as nonresidents because these expenses were not "connected with" Oregon source income as required by ORS 316.360.

The first of the three issues of this case is whether ORS 316.360 denies to nonresidents the deductions of all expenses not incurred to produce the nonresidents' Oregon income. The pertinent part of ORS 316.360 reads as follows:

> "(1) Subject to subsection (2) of this section, in the case of a nonresident taxpayer the deductions allowed by ORS 316.305 to 316.350 shall be allowed only if and to the extent that they are *connected with*:
>
> "(a) Income which arises from sources within

the State of Oregon and which is taxed to a nonresident taxpayer under this chapter; or

"(b) Property having a situs for taxation within the State of Oregon." (Emphasis supplied)

Plaintiffs argue that the phrase "connected with" Oregon source income does not require any direct connection between the claimed expense and Oregon source income, but that the legislature intended to allow a nonresident taxpayer to apportion his deductions among the states in proportion to his income derived from those states. This interpretation strains the language of the statute. In no place does the statute mention or provide for apportionment either expressly or by authorized regulation. Cf. § 873(a) IRC 1954 and Rev. Rul. 56-514 CB 56-2 p 499.

On the contrary, the plain meaning of the statute requires direct connection between the creation of Oregon source income and the claimed deduction. It requires that the expense be incurred to produce the taxpayers' Oregon source income. That the claimed expenses may have been paid with Oregon source income (there is no proof in this case that they were) is too indirect and tenuous a connection to support their deduction.

Some of the deductions mentioned in some of the sections referred to by ORS 316.360 are never incurred to produce income. This appears illogical until one realizes that the sections referred to are all those granting deductions in computing net income. ORS 316.360(1) does not limit nonresident deductions by pick-

ing and choosing between the deduction statutes. Rather it allows all such deductions if, and only if, the deducted expense is connected with the production of Oregon source income.

That the legislature felt it necessary to enact paragraph (2) of ORS 316.360, allowing the deduction of certain charitable contributions, adds support to this interpretation of paragraph (1) of that section. Paragraph (2) does not merely delineate the type of charitable contribution nonresident taxpayers may deduct, rather it creates the deduction itself. Before paragraph (2) was enacted, nonresident taxpayers could not deduct their charitable contributions regardless of where and from what income they were made, because they were not incurred in the production of Oregon source income. See Legal Department Memo of State Tax Commission, September 1, 1948. The enactment of paragraph (2) in 1949 allowed nonresidents to deduct their nonbusiness charitable contributions although they were not properly connected with amounts included in their Oregon source gross income.

There would be no need for the language of paragraph (2) if the statute meant what the plaintiffs contend. The legislature obviously determined that ORS 316.360(1) did not allow charitable deductions to nonresidents. Otherwise it would have used merely words of limitation rather than words of allowance in paragraph (2) of ORS 316.360. By enacting paragraph (2), the legislature has shown its intent that paragraph (1) of ORS 316.360 be interpreted to disallow nonresidents any personal deductions. As with charitable deductions,

a further legislative enactment is required to enable nonresidents to deduct medical and other personal expenses.

The second issue is whether plaintiffs are entitled to be taxed as Oregon residents when they offer to be so taxed and when substantially all of their income is Oregon source income. Residence is a fact, not a matter of election. Their places of residence distinguish resident from nonresident taxpayers. No statute allows a nonresident of Oregon voluntarily to be taxed as a resident. No constitutional compulsion requires Oregon to allow nonresidents to elect to be taxed as residents. *Shaffer* v. *Carter,* 252 US 37 (1920); *Travis* v. *Yale & Towne Mfg. Co.,* 252 US 60 (1920) and *Goodwin* v. *State Tax Commission,* 146 NYS2d 172, affirmed without an opinion by the Court of Appeals of the State of New York in 1 NY2d 680; an appeal to the United States Supreme Court a motion to dismiss was granted per curiam and the appeal was dismissed for want of a substantial federal question. 352 US 805 (1956).

Furthermore, plaintiffs' residence is not altered because substantially all their income is Oregon source income. Cf. ORS 316.055(2) and 316.360 with 315-.055(1) and 316.305 to 316.350. The proportion of income earned from Oregon sources is immaterial even in the interpretation of the term "residence." Webster, Third New International Dictionary (1961). Plaintiffs admittedly do not reside in Oregon. They are not Oregon residents. They cannot elect to be what they are not. Therefore, they cannot be included in that class

which is taxed in a certain way because of its residency in Oregon.

A third issue is whether, as interpreted by the commission and this court, ORS 316.360 denies to nonresidents the guaranties of the Oregon Constitution, Art I, §§20 and 32, the United States Constitution, Art IV, §2 and the XIV amendment, §1, and the Oregon Admissions Act.

Art I, §§20 and 32, of the Oregon Constitution provides:

> "Section 20. No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.
>
> * * * * *
>
> "Section 32. * * * all taxation shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax."

Plaintiffs are not aided by section 20 because that section of the Oregon Constitution applies only to citizens of the State of Oregon. *Alsos* v. *Kendall,* 111 Or 359, 227 Pac. 286 (1924).

Because other than requiring inherent uniformity, section 32 of the Oregon Constitution does not restrain the legislature beyond the restrictions of Amendment XIV of the United States Constitution, the law applicable under the XIVth Amendment determines issues raised under Oregon's section 32. *Standard Lbr. Co. v. Pierce,* 112 Or 314, 228 Pac. 812 (1924).

The Act of June 2, 1869, First Extra Session, 29,

Deady's Laws, 1866, 132, provided "that in no case shall nonresident proprietors be taxed higher than residents." This was enacted pursuant to the Oregon Admissions Act of February 14, 1859, 11 Stat. 389. This court's interpretation of ORS 316.360 does not violate this irrevocable ordinance. Whether residents or nonresidents, all businessmen may deduct their Oregon business expenses from their Oregon business income under ORS 316.360. The Admissions Act provides no protection to the "proprietor" after his business income is earned. Thereafter, on his own personal income as an individual in his nonproprietary capacity, a nonresident may be taxed differently than a resident without violating the Admissions Act.

Plaintiffs next claim that the court's interpretation of ORS 316.360 is interdicted by Art IV §2 and the XIV Amendment, §1, of the United States Constitution. This argument has already been made and answered in *Goodwin* v. *State Tax Commission,* 146 NYS2d 172 affirmed without an opinion by the Court of Appeals of the State of New York in 1 NY2d 680; on appeal to the United States Supreme Court a motion to dismiss was granted per curiam and the appeal was dismissed for want of a substantial federal question. 352 US 805 (1956). In the *Goodwin* case the New York court held that residence had such a legitimate connection with expenditures for medical expenses, interest on loans and other personal expenses that a state would be justified in permitting residents of the state to deduct such expenditures while denying the very same deductions to nonresidents, and that a classification based on

residency in granting and withholding these deductions would not be unconstitutional. In the opinion of this court, the New York court is correct in reason and in law and this court reaches the same conclusion in this case.

In summation, this court holds that under ORS 316.360(1) a nonresident taxpayer may deduct only those expenses directly connected with the earning of Oregon source income, that regardless of the relative or absolute amount of his Oregon income, a nonresident may not elect to be taxed as a resident, and that such interpretation of ORS 316.360 violates neither the Oregon Constitution nor the Oregon Admissions Act nor the Federal Constitution.

A decree sustaining the opinion and order of the State Tax Commission and denying a refund to the plaintiffs will be prepared and submitted under Rule 32.

Dated this 10th day of March, at Salem, Oregon.

/s/ PETER M. GUNNAR,
Judge.

7. Opinion and Order of Tax Commission

STATE OF OREGON
STATE TAX COMMISSION

In the Matter of the Appeal of NATHANIEL E. and FLORENCE E. BERRY, Petition for the Abatement of a Deficiency for Income Tax Assessed for the Calendar Year 1959.	))))))	OPINION AND ORDER No. I-62-27

This matter came on for hearing at 10 a.m. on July 20, 1962, in Room 412 of the State Office Building, Salem, Oregon. Mr. John C. Mull, Assistant Attorney General represented the respondent. No one was present on behalf of the petitioners at the time of the hearing. However, Mr. Lovett, of Veatch, Bauman & Lovett, attorneys for the petitioners had made a request to the Commission that petitioners be allowed to present their case by filing a brief in lieu of an oral presentation. Since the facts in the case were not contested and the only issue concerned the constitutionality of the pertinent Oregon statutes this was allowed. Subsequently, briefs have been filed on behalf of the parties and considered by the Commission together with all of the pertinent files and records pertinent so that the Commission is now ready to rule upon the case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The petition on behalf of Mr. and Mrs. Berry is filed as a result of a deficiency assessment for the calendar tax year 1959, disallowing certain personal deductions claimed by the taxpayers on their return. The deductions which were disallowed are $2,728.75 medical and dental expenditures, the payment of interest on loans in California totaling $759.53, and miscellaneous amounts for union dues, bank fees, car insurance and telephone expense totaling $553.32 none of which is incurred in connection with income earned in Oregon. The taxable income arising in Oregon is derived from a trust which was set up by the father of one of the petition-

ers. The petitioners were residents of the State of California during the year in question and the deductions were disallowed on the basis that they were not related to or connected with income arising from sources within the State of Oregon or property having a situs for taxation within the State of Oregon as required by ORS 316.360 as it pertains to nonresident taxpayers. There is no disagreement with respect to the facts and the appeal herein is based upon the grounds that ORS 316.360 violates certain constitutional provisions; (1) Article I, § 20 of the Oregon Constitution, (2) Article IV, § 2 of the Constitution of the United States, (3) Article V of the Constitution of the United States, (4) Article XIV, § 1 of the Constitution of the United States.

ORS 316.360 provides as follows:

"(1) Subject to subsection (2) of this section, in the case of a nonresident taxpayer the deductions allowed by ORS 316.305 to 316.350 shall be allowed only if and to the extent that they are connected with:

"(a) Income which arises from sources within the State of Oregon and which is taxed to a nonresident taxpayer under this chapter; or

"(b) Property having a situs for taxation within the State of Oregon.

"(2) The deduction prescribed in ORS 316.340, and as therein limited, shall be allowed to a nonresident taxpayer but only with respect to contributions or gifts within the tax year to the United States, the State of Oregon or any political subdivision thereof for use exclusively for public pur-

poses within the State of Oregon, or to a corporation or association described in ORS 316.340, or a chapter or branch thereof, located within the State of Oregon."

The petitioners rely upon *Toomer* v. *Witsell,* 334 U.S. 385; *Standard Lbr. Co.* v. *Pierce et al.,* 112 Or 314; and *Travis* v. *Yale & Towne Mfg. Co.,* 252 U.S. 60 in support of their position herein.

The Supreme Court of the United States held in the *Toomer* case that a state may discriminate against nonresidents without violating the privileges and immunities clauses of the federal Constitution where there are valid independent reasons for such discrimination. However, that case involved license fees ($25 for residents and $2,500 for nonresidents) charged for shrimp fishing off the coast of South Carolina. The difference in license fees was held after a review of the facts and circumstances to constitute discrimination against nonresidents. In fact the court found that there was evidence that the license fee arrangement was aimed at denying fishing privileges to nonresidents.

In *Standard Lbr. Co.* v. *Pierce,* it was held that "such classification must rest upon some ground or difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike". The Commission is not at odds with the general rule as stated. This is more aptly presented in the situation relating to *Travis* v. *Yale & Towne Mfg. Co.,* 252 U.S. 60, cited by the petitioners which was considered conjunctively and handed down at the same time with the case of *Shafer* v.

Carter, 252 U.S. 37. The *Travis* case concerned "exemptions" and it was held that the law of New York which permitted exemptions of $1,000 for a single person, $2,000 for a married person and $200 for each additional dependent only allowable to residents and without similar exemptions being allowable to nonresidents was discriminatory and not founded with justifiable relation to any classification. However, the *Shafer* case determined at the same time held that there was no unconstitutional discrimination in confining the allowance as deductions of expenses, losses, and other expenditures by nonresident taxpayers to items expended in connection with the production of income arriving from sources within the state. The court held that the Oklahoma income tax law did not deny nonresidents privileges and immunities or the equal protection of the laws when it permitted residents to deduct from gross income losses incurred within or without the state while nonresidents could only deduct expenses incurred within the state. In New York following the *Travis* case, *Goodwin* v. *State Tax Commission,* 286 App. Div. 694, 146 NYS2d 172; affd. 1 NY2d 680, 133 NE2d 711; dismissed per curiam 352 U.S. 805, 77 S. Ct. 47 was decided. Section 360(11), N.Y. Tax Law, allowed nonresident deductions only to the extent that they were connected with income arising from sources within the state and taxable to a nonresident taxpayer. The case held that the provision of a New York law which denied a nonresident the right to deduct real estate taxes on his home in New Jersey, interest on the mortgage on his home, medical expneses and life insurance premiums did not

discriminate against nonresidents although a resident was allowed to claim such deductions. The court stated:

> "That it is obviously proper, in determining the net income of a nonresident to limit the deductions to expenses which are connected with gross income derived from sources within the tax state, since the income derived from any other source is not subject to the state's taxing power. On the other hand, residents are subject to the state's plenary taxing power, and they may be required to pay a tax on all their income, regardless of the location of its source."

The Commission is in agreement with the reasoning stated in the *Goodwin* case and, therefore finds that the appeal should be dismissed.

IT IS THEREFORE ORDERED that the petition herein designated be and the same hereby is dismissed.

Dated this 5th dayof October, 1962.

STATE TAX COMMISSION

/s/ C. H. MACK,
Commissioner and Chairman
/s/ F. H. W. HOEFKE,
Commissioner
/s/ P. F. LINIGER,
Commissioner and Secretary

8. Legal Department Memorandum

STATE TAX COMMISSION

Legal Department Memorandum, September 1, 1948

Re: Deductions Allowed a Nonresident Taxpayer Under Section 110-1611 (12), O.C.L.A.

Taxpayers A and B, husband and wife, have been residents of the state of Washington for many years, where A carries on his profession as a lawyer. Beginning in 1944, A invested in certain Oregon lumber and trucking activities and since that time has filed Oregon income tax returns on behalf of himself and his wife B. Although A and B made no charitable contributions in Oregon, they did make substantial charitable contributions to community chests, the Red Cross, the Y.M.C.A. and several universities and colleges and eleemosynary institutions which, if made by an Oregon resident, would clearly be deductible up to the 15% limitation imposed by section 110-1611 (11). The taxpayer has now filed claims for refund for such percentage of charitable contributions as his Oregon income before deducting contributions bears to his total income before deducting contributions.

It is submitted that the taxpayer's claim for refund on account of charitable contributions made by him must be rejected.

* * * * *

Our Oregon statute, section 110-1611, specifically provides that in computing net income there shall be allowed certain deductions, some of which are clearly connected with income-producing activities, others which have no relation to such activities, and a third group which may be found in both categories, as follows: [Tables omitted].

* * * * *

The provision for deductions in computing net income, so carefully restricted in the case of the general

income taxpayer in the foregoing subsections, is narrowed even further in the case of the nonresident income taxpayer by subsection 12 of the same section which reads:

> "In the case of a nonresident taxpayer the deductions allowed by this section shall be allowed only if and to the extent that they are connected with income which arises from sources within the state of Oregon and which is taxed to a nonresident taxpayer by the state of Oregon."

* * * * *

An examination of the statutes reveals that most income tax states have some special provisions in the case of taxpayers who are nonresidents, generally restricting deductions but allowing them to the extent that they are connected with income arising from sources within the state and taxable to the nonresident taxpayer. (CCH, State Tax Guide Service, Summary by States, par. 28-050.) There is considerable variance in the treatment of contributions and of "casualty losses." In contrast to some, Oregon's statute (subsection 12) appears to be of a rather primitive order in its discrimination against nonresidents. In our subsection 11 of deduction is allowed to the taxpayer for gifts made to the state of Oregon or any political subdivision thereof for use exclusively for public purposes within the state of Oregon. Subsection 12 would prevent a Washingtonian who has income from Oregon sources receiving any deduction if he made a $50,000 gift to the Oregon State School for the Blind. Similarly, a Washingtonian who pays a large income tax to Oregon is not permitted a casualty deduction if his Oregon beach cottage is washed away in

a storm, nor can he deduct the ad valorem property taxes he has paid. Clearly, in each of these cases the Oregon resident would be entitled to a deduction. Such discrimination seems patently unrational as well as unfair, and it is suggested that it represents a legislative oversight rather than a deliberate policy.

* * * * *

[Examples omitted]

* * * * *

It is recommended that the Oregon statute respecting deductions for nonresidents be studied in the light of the foregoing examples with a view to drafting recommendations to the legislature.

APPENDIX B

1. Constitutional and Statutory Provisions Involved

a. United States Constitution, Article IV, Section 2, Clause 1:

> "Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

b. United States Constitution, Article VI, Clause 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

c. Fourteenth Amendment to the United States Constitution, Section 1:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

d. Oregon Admission Act, Act of [Congress of] February 14, 1859, Section 4, 11 Stat. 383:

> "Sec. 4. And be it further enacted, that the following propositions be, and the same are hereby, offered to the said people of Oregon for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the said State of Oregon, to-wit: * * * Provided, That the foregoing propositions, hereinbefore offered, are on

the condition that the people of Oregon shall provide by an ordinance, irrevocable without the consent of the United States, * * * that in no case shall non-resident proprietors be taxed higher than residents."

e. Oregon Constitution, Article I, Section 20:

"Section 20. No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

f. Act of June 3, 1859, Section 1, [Oregon] First Extra Session, 29; Deady's Laws, 1866, 132; Vol. 5, p. 1169, Oregon Revised Statutes:

"Section 1. Be it enacted by the Legislative Assembly of the State of Oregon, That the six propositions offered to the people of Oregon in the above-recited portion of the act of Congress aforesaid, be, and each and all of them are hereby accepted; and for the purpose of complying with each and all of said propositions hereinbefore recited, the following ordinance is declared to be irrevocable without the consent of the United States, to wit:

Be it ordained by the Legislative Assembly of the State of Oregon, * * * and that in no case shall non-resident proprietors be taxed higher than residents. * * *"

g. Oregon Personal Income Tax Act of 1953, ORS c 316:

"316.055 Imposition of tax. (1) A tax hereby is imposed upon every resident of the state upon and with respect to his entire net income, as defined in ORS 316.125, including his entire net income from sources both within and without the state.

(2) A like tax hereby is imposed upon every individual not a resident of this state upon and with respect to his entire net income, as defined in ORS 316.125, from all property located in the state, including interest, or any amount in lieu thereof, upon the deferred payments of the selling price received in connection with the sale of such property, and from every business, trade, profession or occupation carried on in the state, including income from money or credits and other intangible personal property used by such nonresident individual in the conduct of his business, trade, profession or occupation within the state."

"316.325. Net Income. 'Net Income' means the gross income of the taxpayer as defined in ORS 316.105 to 316.115, less the deductions allowed by ORS 316.305 to 316.370."

316.305 [Business expenses.]
316.306 [Employes' plan contributions.]
316.310 [Interest expense.]
316.315 [Taxes.]
316.320 [Business and non-business losses.]
316.325 [Loss from wash sales of securities.]
316.330 [Bad debt losses.]
316.335 [Depreciation and depletion.]
316.336 [Optional depreciation and depletion.]
316.337 [Soil and water conservation expenses.]
316.340 [Contributions and gifts.]
316.345 [Extraordinary medical expenses.]
316.350 [Bond premiums.]

"316.360. Deductions allowed nonresident taxpayers. (1) Subject to subsection (2) of this section, in the case of a nonresident taxpayer the deductions allowed by ORS 316.305 to 316.350 shall be allowed only if and to the extent that they are connected with:

(a) Income which arises from sources within the State of Oregon and which is taxed to a nonresident taxpayer under this chapter; or

(b) Property having a situs for taxation within the State of Oregon.

(2) The deduction prescribed in ORS 316.340, and as therein limited, shall be allowed to a nonresident taxpayer but only with respect to contributions or gifts within the tax year to the United States, the State of Oregon or any political subdivision thereof for use exclusively for public purposes within the State of Oregon, or to a corporation or association described in ORS 316.340, or a chapter or branch thereof, located within the State of Oregon."

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In the Supreme Court of the United States

OCTOBER TERM 1964

No. 229

NATHANIEL E. BERRY,

Plaintiff-Appellant,

v.

STATE TAX COMMISSION,

Defendant-Appellee.

On Appeal From the Supreme Court of the State of Oregon

MOTION TO DISMISS

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In the Supreme Court of the United States

OCTOBER TERM 1964

No. .....

NATHANIEL E. BERRY,

Plaintiff-Appellant,

v.

STATE TAX COMMISSION,

Defendant-Appellee.

On Appeal From the Supreme Court of the State of Oregon

MOTION TO DISMISS

Appellee in the above-entitled case, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal from the decree of the Supreme Court of the State of Oregon be dismissed on the grounds that the appeal does not present a substantial federal question worthy of further argument.

OPINIONS BELOW

1. *Opinion of Oregon Supreme Court.* The opinion of the Oregon Supreme Court and the dissenting opinion are reported in 79 Or. Adv. Sh. 689, 397 P2d 780 (1964) and are printed in Appendix A, pp. A1 to A8 of Appellant's Jurisdictional Statement and the opinion deny-

ing the Petition for Rehearing is reported in 80 Or. Adv. Sh. 179, 399 P2d 164 (1964), and is printed in Appendix A, pp. A10 to A11 to Appellant's Jurisdictional Statement.

2. *Opinion of Oregon Tax Court.* The opinion of the Oregon Tax Court is reported in 1 OTC Adv. Sh. 483 (1964), and is printed in Appendix A, pp. A12 to A19 to Appellant's Jurisdictional Statement.

3. *Opinion of State Tax Commission.* The opinion of the State Tax Commission is not reported but is printed in Appendix A, pp. A19 to A24 to Appellant's Jurisdictional Statement.

QUESTIONS PRESENTED

Without quoting the alleged questions set forth in Appellant's Notice of Appeal and Jurisdictional Statement, appellee believes the questions can be stated more simply as follows:

1. Does the equal protection clause of the Fourteenth Amendment to the United States Constitution prohibit the State of Oregon from imposing a personal income tax upon nonresidents which allows as deductions to residents certain personal expenses but which allows the same to nonresidents only to the extent that such expenses are connected with income arising from sources within Oregon which is taxed to them?

2. Does the Privileges and Immunities Clause of the United States Constitution prohibit such taxation?

3. Does the Oregon Admissions Act, either alone or in connection with the Supremacy Clause of the United States Constitution prohibit such taxation?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Appellant has set forth satisfactorily the applicable statutes and constitutional provisions involved in Appendix B of Appellant's Jurisdictional Statement except for the quotations of the Oregon Admissions Act, Act of [Congress of] February 14, 1859, Section 4, 11 Stat. 383, and Act of June 3, 1859, Section 1, [Oregon] First Extra Session, 29; Deady's Laws, 1866, 132; Vol. 5, p. 1169, Oregon Revised Statutes; which as quoted, omit and delete portions pertinent to the understanding of the material and which are set forth more fully herein as Appellee's Appendix A, pp. 15–17.

STATEMENT OF THE CASE

This is an appeal by Mr. Nathaniel Berry, at all times pertinent hereto a resident of the State of California. The appeal is from an assessment of additional income taxes, together with penalty and interest, by the Oregon State Tax Commission for the calendar year 1959. In the calendar year 1959 the appellant received income from an Oregon trust and had no other income except for $52.42 interest income received from sources within the State of California. The assessment of additional taxes arises from the disallowance of certain personal deductions claimed upon appellant's income tax return filed by him with the State of Oregon. The deductions disallowed consisted of $2,728.75 medical-dental expense, the payment of interest on loans in California totalling $759.53 and miscellaneous amounts for union dues, bank

fees, car insurance and telephone expense totalling $553.32, none of which (it is conceded) was incurred in connection with income earned in Oregon.

The appellant received income from an Oregon trust established by his father and part of the trust property consists of certain real property located in Oregon. It has never been contended that appellant has at any time pertinent hereto been the owner or proprietor of any real property situated within the State of Oregon.

The tax asserted is not an ad valorem property tax but is an income tax asserted solely with respect to income received by the appellant as a beneficiary of the Oregon trust. The sole basis for the disallowance of the deductions by the Oregon State Tax Commission was that the deductions claimed were not connected with income arising from sources within the State of Oregon or property having a situs for taxation within the State of Oregon as required by ORS 316.360 of the tax laws of the State of Oregon.

The principal question in the opinion of the appellee concerning the disallowance to appellant of deductions which would have been allowable to residents is whether or not this is discriminatory under the provisions of the Equal Protection or the Privileges and Immunities Clause of the Constitution. Although appellant pleaded contravention of the Oregon Admissions Act in the lower court, the contention that such was in violation of the Supremacy Clause does not appear to have been brought before the lower court.

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

A. The Oregon Income Tax Act Under Attack Is Not Discriminatory With Respect to Nonresidents Under Either Section 2, Article IV, or Section 1, of the Fourteenth Amendment of the United States Constitution.

ORS 316.325 allows certain deductions to taxpayers in arriving at taxable net income in a manner similar to Federal Income Tax Laws. These deductions are set forth in ORS 316.305 through ORS 316.350 and include business expenses, casualty losses, theft losses, business and nonbusiness interest expenses, contributions, medical expenses, etc. ORS 316.360[1] allows the foregoing deductions to nonresidents but only to the extent that such expenses are connected with Oregon income taxable to the nonresident. All such expenses are allowable to residents. Appellant's expenses (chiefly interest and medical-dental expenses) are conceded not to be connected with Oregon income.

---

[1] "316.360. (1) Subject to subsection (2) of this section, in the case of a nonresident taxpayer the deductions allowed by ORS 316.305 to 316.350 shall be allowed only if and to the extent that they are connected with:

"(a) Income which arises from sources within the State of Oregon and which is taxed to a nonresident taxpayer under this chapter; or

"(b) Property having a situs for taxation within the State of Oregon.

"(2) The deduction prescribed in ORS 316.340, and as therein limited, shall be allowed to a nonresident taxpayer but only with respect to contributions or gifts within the tax year to the United States, the State of Oregon or any political subdivision thereof for use exclusively for public purposes within the State of Oregon, or to a corporation or association described in ORS 316.340, or a chapter or branch thereof, located within the State of Oregon.

The basis for distinguishing between residents and nonresidents for tax purposes under such circumstances inherently rests upon the plenary taxing power of the state which may tax all of the income of its residents wherever earned but which is limited with respect to the taxation of nonresidents except as to income arising from sources within the taxing state. The state exercises dominion over its own citizens and is concerned with their medical expenses, casualty losses, expenses, etc. The expenditures of nonresidents are more likely to be in proportion to income not taxable by the state and are not situated so as to be readily accessible to audit.

The question raised by this appeal is not a new one. It was first raised with respect to the New York income tax law in 1919 (L. 1919, chap. 627) challenged in *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 40 S. Ct. 228, 64 L. Ed. 460 (1920), decided by the United States Supreme Court March 1, 1920, together with *Shaffer v. Carter*, 252 U.S. 37, 40 S. Ct. 221, 64 L. Ed. 445 (1920), a case involving the constitutionality of the Oklahoma income tax law.

In the two cases, the first question presented concerned the power of a state to tax the income of a resident of another state. In the *Shaffer* case, after upholding the state's power to tax nonresidents upon income earned within Oklahoma, the validity of a provision similar to Oregon's was sustained.[3]

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[3] "* * * As to residents it may, and does, exert its taxing power over their income from all sources, whether within or without the state, and it accords to them a corresponding

Mr. Justice Pitney, who wrote both decisions, was of the opinion that deductions, either business or nonbusiness, were properly disallowed by the taxing state except to the extent connected with income. Thus, in the *Travis* case the Court upheld the right of New York to disallow personal deductions to nonresidents (N. Y. Law, Sec. 360) but refused to allow differing exemptions, striking down provisions (sec. 362) providing for different exemptions as between residents and nonresidents. The Court unmistakably dealt with the propriety of restricting deductions to those connected with income arising from sources within the state.[8]

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privilege of deducting their losses, wherever these accrue. As to nonresidents, the jurisdiction extends only to their property owned within the state and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources. Hence there is no obligation to accord to them a deduction by reason of losses elsewhere incurred. * * *" (252 U.S. 37, 57)

[8] "In section 360 provision is made for deducting in the computation of net income expenses, taxes, losses, depreciation charges, etc.; but, by paragraph 11 of the same section:

" 'In the case of a taxpayer other than a resident of the state the deductions allowed in this section shall be allowed only if, and to the extent that, they are connected with income arising from sources within the state. * * *'

* * *

"[1, 2] That the state of New York has jurisdiction to impose a tax of this kind upon the incomes of nonresidents arising from any business, trade, profession, or occupation carried on within its borders, enforcing payment so far as it can by the exercise of a just control over persons and property within the state, as by garnishment of credits (of which the withholding provision of the New York law is the practical equivalent), and that such a tax, so enforced, does not violate the due process of law provision of the Fourteenth Amendment, is settled by our decision in Shaffer v. Carter, State Auditor, 252 U.S. 37, 40 Sup. Ct. 221, 64 L. Ed. ——, this day

New York deleted the offending exemption provision (sec. 362) from its laws and subsequently the case arose of *Goodwin v. State Tax Commission*, 286 App. Div. 694, 146 NY2d 172 (1955), 1 NY2d 680, 133 NE2d 711 (1956), dismissed per curiam 352 U.S. 805, 77 S. Ct. 47, 1 L. Ed2d 38 (1956), which was substantially identical to the instant case.

The taxpayer in the *Goodwin* case was a New Jersey resident who was an attorney and whose income was entirely earned in the State of New York. In the State of New Jersey, the taxpayer incurred personal expenditures consisting of real estate taxes $302.03, mortgage interest $669.23, medical expense $1,298.33, and life insurance premiums $150.00, totalling $2,419.59. The contention was that New York discriminated as between residents and nonresidents by allowing such expenses to residents and denying them to nonresidents. The taxpayer pleaded discrimination under Section 2 of Article IV of the United States Constitution and Section 1 of the Fourteenth Amendment thereto. The New York court, in holding that there was no discrimination, relied upon the cases cited above of *Shaffer v. Carter*, 252 U.S. 37, *supra*, and *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, *supra*. The determination in the *Goodwin* case is so

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announced, involving the Income Tax Law of the state of Oklahoma. That there is no unconstitutional discrimination against citizens of other states in confining the deduction of expenses, losses, etc., in the case of nonresident taxpayers, to such as are connected with income arising from sources within the taxing state, likewise is settled by that decision." (252 U.S. 60, 73-76)

parallel to the instant situation and the reasoning of the lower court so applicable that appellee's argument on the point is readily summed up by quotation from that decision.[6]

The *Shaffer* and the *Travis* cases have been generally accepted as law. See Solomon, *"Nonresident Personal Income Tax: A Comparative Study in Eight States,"* 29 Fordham L. Rev. 105, 140 (1960), and Culp, *"Selected Problems in Multi-State Taxation,"* 44 Iowa L. Rev. 280 (1959).

For further illustrative purposes one might consider the deduction of interest, assuming arguendo that non-

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[6] "In the *Travis* case (the New York State Income Tax case), the Court first considered the provision of section 360 of the Tax Law 'for deducting in the computation of net income expenses, taxes, losses, depreciation charges, etc.;' but limiting such deductions in the case of a non-resident to such as 'are connected with income arising from sources within the state' (252 U.S. at p. 73). The Court held this provision to be valid upon the basis of its decision in the *Shaffer* case:

" 'That there is no unconstitutional discrimination against citizens of other States in confining the deduction of expenses, losses, etc., in the case of nonresident taxpayers to such as are connected with income arising from sources within the taxing State, likewise is settled by that decision [*Shaffer v. Carter*]' (pp. 75-76)

* * *

"The Attorney General maintains that the *Travis v. Yale and Towne* case disposes of the very point which the plaintiff seeks to raise here. He directs attention to the fact that, in the brief submitted on behalf of the appellee in the Supreme Court in that case, its counsel pointed out, as an illustration of the discriminatory nature of the New York statute, that, under section 360, a resident of New York could deduct real estate taxes upon his home while a resident of Connecticut, working in New York, would not be allowed to do so. The statement by the Supreme Court quoted above, upholding the provisions of section 360, seems to have been intended as a direct answer to this contention." (1 NY2d 680, 696)

residents were allowed to fully deduct interest on the same basis as residents. Oregon allows to residents as a deduction interest (business or nonbusiness) wherever incurred. If nonresidents were allowed to deduct all interest incurred everywhere against income taxable by Oregon it would be possible for a nonresident to erase all of his Oregon taxes. For example, assume that an individual could borrow money at 6 percent interest and invest the funds obtained so as to achieve an income equal to interest paid. Merely by incurring sufficient interest expense the taxpayer could create a deduction large enough to offset all of his Oregon income. The taxpayer would be reimbursed his interest expense by having out-of-state income resulting from the investment but Oregon would not be able to tax such income since it would be earned outside of the State of Oregon by a nonresident.

In the *Travis* case, 252 U.S. 60, *supra*, the New York statute (section 362) which was held discriminatory permitted exemptions of $1,000 for a single person, $2,000 for a married person with $200 as an additional exemption for each dependent, but withheld similar exemptions to nonresidents. In order to obtain such an exemption no actual expenditure or loss must be incurred. By the allowance of varying exemptions it is obviously possible for the taxing state to vary the actual rate of taxation. Thus, an exemption is basically one method of varying the tax rate and, while there may be a basis for allowing differing exemptions as between single persons and married persons, no such valid distinction exists between

residents and nonresidents. At the same time it is fair to note that the expenditures of noncitizens are likely to be in proportion to income not taxable by the state and whereas the state exercises dominion over its own citizens and their losses, expenses, etc., are of concern to the state, nevertheless, the only connection between a nonresident and the taxing state is the jurisdiction over income received from sources within the state.

B. The Oregon Admissions Act Has No Application to a Nonresident Who Is Not the Proprietor of Real Property Located Within the State.

In 1859 the State of Oregon adopted a constitution of state government and applied for admission into the union on an equal footing with other states. Congress, on February 14, 1859, enacted 11 Stat. 383 and in section 4 thereof offered certain propositions to the people of Oregon for their free acceptance or rejection which, if accepted, would be obligatory upon the United States and upon the State of Oregon. The first proposition was that certain lands would be granted to Oregon to be used for schools. The second proposition was that 72 sections of land would be reserved for the use and support of a state university. The third proposition was that ten sections of land would be granted to the state for an erection of a seat of government. The fourth proposition gave to the state certain salt springs located within the state. The fifth proposition was that 5 percent of the net proceeds of sales of public lands within the state would be paid over to Oregon for the purpose of making public roads and internal improvements. It was further

provided that the foregoing propositions were offered on the condition that the people of Oregon would provide that the state would not interfere with the primary disposal of soil within the state by the United States or with any regulations necessary for securing the title in said soil to bona fide purchasers thereof; "* * * and that in no case shall non-resident proprietors be taxed higher than residents. *Sixth*, And that the said state shall never tax the lands or the property of the United States in said state: * * *"

By Act of June 3, 1859, Section 1, First Session, 29; Deady's Laws, 1866, 132; Vol. 5, p. 1169, the State of Oregon accepted the propositions offered by the Congress of the United States as set forth above. After restating the propositions verbatim which had been offered, the acceptance provided "* * * and that in no case shall non-resident proprietors be taxed higher than residents; and that the said state shall never tax the lands or property of the United States in said state: * * *"

It seems obvious that the parties were only concerned with the possibility of a tax to be levied upon the proprietors of land. Income taxes were nonexistent at either the federal level or state level at the time. It is conceded that, with respect to ad valorem taxes, Oregon may not tax nonresident-owned land at a different rate than land owned by residents. An income tax is levied upon the recipients of income and does not of course single out "proprietors", either resident or nonresident.

The Oregon Supreme Court did not offer any inter-

pretation of the Oregon Admissions Act and presumably did not deem it pertinent with respect to the interpretation of the income tax laws. However, the opinion of the Oregon Tax Court (Appendix to Jurisdictional Statement, p. A18) stated as follows:

> "* * * This court's interpretation of ORS 316.360 does not violate this irrevocable ordinance. Whether residents or nonresidents, all businessmen may deduct their Oregon business expenses from their Oregon business income under ORS 316.360. The Admissions Act provides no protection to the 'proprietor' after his business income is earned. Thereafter, on his own personal income as an individual in his non proprietary capacity, a nonresident may be taxed differently than a resident without violating the Admissions Act."

CONCLUSION

To make out a case based upon a substantial federal question, appellant must turn the *Travis v. Yale & Towne Mfg. Co.* case, 252 U.S. 60, *supra,* into a case which deals only with exemptions and ignores the distinctions drawn between deductions and exemptions. In erasing those distinctions, deductions would, in effect, be treated the same as exemptions. It is urged that the distinctions have been nicely drawn for a substantial period of time with reliance thereon by the various states and that there is no unconstitutional discrimination against citizens of other states in confining the deductions of expenses, losses, etc., in the case of nonresident taxpayers to such as are connected with income arising

from sources within the taxing state. Appellant further attempts to construe the Oregon Admissions Act as extending to other than the taxation of lands to the proprietors thereof and to make the mandates of that Act a barrier to the imposition of an income tax, the incidence of which clearly falls upon the recipients of income and is not aimed at or levied upon proprietorship. It is submitted that appellant has failed to show violations of the equal protection clause, the Privileges and Immunity Clause or the Supremacy Clause through any violation of the Oregon Admissions Act. Appellee requests dismissal of the appeal upon the grounds that the appeal does not present a substantial federal question.

Respectfully submitted,

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APPENDIX A

1. Oregon Admissions Act, Act of [Congress of] February 14, 1859, Section 4, 11 Stat. 383:

"§ 4. The following propositions be, and the same are hereby offered to the said people of Oregon for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the said state of Oregon, to wit: *First,* That sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said state for the use of schools. *Second,* That seventy-two sections of land shall be set apart and reserved for the use and support of a state university, to be selected by the governor of said state, subject to the approval of the commissioner of the general land-office, and to be appropriated and applied in such manner as the legislature of said state may prescribe for the purpose aforesaid, but for no other purpose. *Third,* That ten entire sections of land, to be selected by the governor of said state, in legal subdivisions, shall be granted to said state for the purpose of completing the public buildings, or for the erection of others at the seat of government, under the direction of the legislature thereof. *Fourth,* That all salt springs within said state, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to said state for its use, the same to be selected by the governor thereof within one year after the admission of said state, and when so selected, to be used or disposed of on such terms, conditions and regulations as the legislature shall direct: *Provided,* That no salt spring or land, the right whereof is now vested in any individual or individuals, or which may be hereafter confirmed or adjudged to any

individual or individuals, shall by this article be granted to said state. *Fifth,* That five percentum of the net proceeds of sales of all public lands lying within said state which shall be sold by congress after the admission of said state into the Union, after deducting all the expenses incident to the same, shall be paid to said state, for the purpose of making public roads and internal improvements, as the legislature shall direct: *Provided,* That the foregoing propositions, hereinbefore offered, are on the condition that the people of Oregon shall provide by an ordinance, irrevocable without the consent of the United States, that said state shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations congress may find necessary for securing the title in said soil to bona fide purchasers thereof; and that in no case shall non-resident proprietors be taxed higher than residents. *Sixth,* And that the said state shall never tax the lands or the property of the United States in said state: *Provided, however,* That in case any of the lands herein granted to the state of Oregon have heretofore been confirmed to the territory of Oregon for the purposes specified in this act, the amount so confirmed shall be deducted from the quantity specified in this act."

2. Act of June 3, 1859, Section 1 [Oregon] First Extra Session, 29; Deady's Laws, 1866, 132; Vol. 5, p. 1169, Oregon Revised Statutes:

"WHEREAS, the congress of the United States did pass an act, entitled, 'An act for the admission of Oregon into the Union,' approved the fourteenth day of February, one thousand eight hundred and fifty-nine; which said act contains the following propositions for the free acceptance or rejection of the state of Oregon, in the words following: [Section 4 of the Oregon Admissions Act was quoted in full]

"§ 1. That the six propositions offered to the people of Oregon in the above recited portion of the act of congress aforesaid, be, and each and all of them are hereby accepted; and for the purpose of complying with each and all of said propositions hereinbefore recited, the following ordinance is declared to be irrevocable without the consent of the United States, to wit:

"*Be it ordained by the legislative assembly of the state of Oregon,* That the said state shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations congress may find necessary for securing the title in said soil to the *bona fide* purchasers thereof; and that in no case shall non-resident proprietors be taxed higher than residents; and that the said state shall never tax the lands or property of the United States within said state."

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In the Supreme Court
of the United States

OCTOBER TERM 1965

No. 229

NATHANIEL E. BERRY,
Plaintiff-Appellant,

v.

STATE TAX COMMISSION,
Defendant-Appellee.

On Appeal from the Supreme Court of the State of Oregon

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 7-65

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1. Questions Presented (Jur. St. 4-5).

The issue invoking the Supremacy Clause (Jur. St. 4-5) was clearly raised and argued in the lower courts and disposed of by the Oregon Tax Court. (See Jur. St. 8-10 for full references). It was manifest that alleged contravention of an act of Congress (the Oregon Admission Act) by a state statute (ORS 316.360) necessarily invokes the Supremacy Clause, even though not named as such.

2. Statement of Facts (Jur. St. 6-8).

Appellant has always contended, and it is stipulated, that he was and is the beneficiary of a trust of real property located in Oregon (R. 3; App. Br. 6; R. 5). Such fact constitutes him a proprietor of land within the meaning of the Oregon Admission Act and gives him standing to invoke the protection of the Act.

ARGUMENT

1. The Oregon Admission Act Applies in this case.

The Oregon Admission Act (B. 1-2), provided, among other things, that nonresident "proprietors" should never be "taxed" higher than residents by the State of Oregon. ORS 316.360 expressly denies all personal, nonbusiness deductions in the case of a nonresident taxpayer, and thus taxes him at a higher rate than resident taxpayers.

The Tax Court clearly erred in construing "proprietor" to mean only a businessman, and in holding that the Act does not protect personal income from land (1 O.T.C. Adv. Sh. 483, 488; A. 18). The word "proprietor" in 1859 and in the Act included an owner of land. See *Van Brocklin* v. *Tennesse*, 117 U.S. 151, 161, 167, 6 S. Ct. 670, 676, 29 L. Ed. 845, 848, 850 (1886), and *Woodruff* v. *North Bloomfield Gravel Mining Co.*, 18 F. 753, 772, 785 (C.C. Cal., 1884), both involving comparable statehood acts. Appellee now concedes that the Act refers to proprietors of land (Mot. Dis. 12).

In its argument before the Oregon Supreme Court, appellee relied upon the Tax Court ruling that the word

"taxed" in the Act includes business income. Now, for the first time, appellee contends that "taxed" refers only to ad valorem taxes (Mot. Dis. 12). Its premise is that income taxes were nonexistent in 1859, the time of enactment of the Act.

Appellee's view of history is inaccurate. Charleston, South Carolina enacted an income tax prior to 1818. Act of Incorporation, 7 Stat. 98, § 4. See *Lining* v. *City Council,* 1 McCord 345, 349, 8 S.C.L.R. 217, 219 (1821); *Bulow* v. *City Council,* 1 Nott & McCord 527, 528, 530, 7 S.C.L.R. 318, 319, 320 (1818). There were others. See, e.g. *Mayor, & c. of Savannah* v. *Hartridge,* 8 Ga. 23 (1849); *City of New Orleans* v. *E. J. Hart & Co.,* 14 La. Ann. 803 (1859) (Act of March 19, 1856).

A number of cases have held that income taxes are included in state constitutional restrictions on the rate of taxation on "taxable property" and similar provisions. E. g., *Eliasberg Bros. Mercantile Co.* v. *Grimes,* 204 Ala. 492, 86 So. 56, 61 (1920), construing a provision of the 1875 constitution.

Taxes on income were mentioned in *Hylton* v. *United States,* 3 Dall. 171, 174, 180, 1 S. Ct. 150, 152, 158, 1 L. Ed. 556, 557, 560 (1796). A federal income tax was proposed but not adopted during the War of 1812. The first federal income tax was adopted by the Act of August 5, 1861, Sec. 49, 12 Stat. 292, 309.

Appellee concedes that, with respect to ad valorem taxes, at least, the State of Oregon cannot tax lands of nonresidents at a different rate than land of residents

(Mot. Dis. 12), by reason of the mandate of the Oregon Admission Act. Prohibitions on state taxing power were regularly included by Congress in statehood acts from the Act of March 1, 1817, 5 Stat. 348, 349 (Mississippi) to the Act of July 16, 1894, 28 Stat. 107, 108 (Utah). The apparent purpose is quite like the purpose of the Privileges and Immunities Clause, to provide a broad policy of equal treatment for nonresidents. Cf. discussion in *Van Brocklin* v. *Tennessee, supra,* 117 U.S. at 165-66, of broader construction of prohibitions in statehood acts.

With this policy in mind, it isn't the kind of tax that matters but the unreasonableness of the discrimination. As to the distinction between income and property taxes, one state court said:

> "The reason for protection in the one case is as compelling as it is in the other. The lack of protection in the one case leads to the same consequences that it leads to in the other. We think that the policy and the purpose of the Constitution, in harmony with its terms, equally embraces both." *Eliasberg Bros. Mercantile Co.* v. *Grimes,* 204 Ala. 492, 86 So. 56, 61 (1920) (Ala. Const.)

License fees, ad valorem taxes, income taxes, estate taxes, sales taxes and other taxes have all run afoul of the Privileges and Immunities Clause. (See annotation, notes 131-157, to U.S.C.A., Const. Art. IV, Sec. 2, cl. 1).

If the scope of the statehood acts is limited to ad valorem taxes, total evasion of the statutory policy is possible. The construction of those federal statutes requires the consideration of this Court to prevent erosion by state enactments.

2. A nonresident taxpayer is entitled to the same deductions as a resident taxpayer.

In the court below, appellant relied on the case of *Sprague* v. *Fletcher,* 69 Vt. 69, 75, 37 Atl. 239, 241 (1896). (App. Br. 17-20; R. 5). In that case a nonresident claimed to be a resident in order to get the same tax deductions allowed to residents. The Vermont court held that by reason of the Privileges and Immunities Clause, the nonresident was entitled to be taxed in the same manner as a resident.

This Court apparently adopted the same view in *Reserve Life Insurance Co.* v. *Bowers,* 380 U.S. 258, 13 L. Ed. 2d 959, 85 S. Ct. 951 (1965), which reversed and remanded, per curiam, an Ohio case on the basis of *Wheeling Steel Corp.* v. *Glanders,* 337 U.S. 562, 69 S. Ct. 1291, 93 L. Ed. 1544 (1949).

In the *Reserve Life* case, *supra,* a Texas insurance company doing business in Ohio sought to be listed as a domestic insurance company for tax purposes, because foreign insurers were taxed under a different statute than that which taxed domestic insurers. The Ohio court held that the taxpayer could not claim the exemption granted the domestic insurance companies. *Reserve Life Insurance Company* v. *Bowers,* 119 Ohio App. 251, 257, 258, 196 N.E.2d 114, 118 (1963). The Ohio Supreme Court had affirmed without comment. 175 Ohio St. 468, 196 N.E.2d 87 (1964). This Court's action would seem to affirm the holding in *Sprague* v. *Fletcher, supra.*

3. The State must allow nonresident taxpayers to deduct a proportionate part of the personal deductions allowed to resident taxpayers.

The lower courts and appellee have not previously suggested any reasonable ground for the discrimination other than the fact of nonresidence. In fact, the appellee State Tax Commission previously admitted that this same discrimination "seems patently unrational as well as unfair, * * *." (A. 27). Two justices of the court below agreed that the discrimination was unconstitutional. (A. 8). Now appellee urges:

> "The state exercises dominion over its own citizens and is concerned with their medical expenses, casualty losses, expenses, etc. The expenditures of nonresidents are more likely to be in proportion to income not taxable by the state and are not situated so as to be readily accessible to audit." (Mot. Dis. 6).

If the argument is sound, a state would be justified in denying the personal exemption or the standard deduction to nonresidents on the same ground, since they have the same social purposes. This Court expressly rejected the contention in *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. 60, 40 S. Ct. 228, 64 L. Ed. 460 (1920).

Appellee contends that there is a distinction for tax purposes between a flat exemption and an itemized deduction (Mot. Dis. 10-11). Some of the authorities relied on by appellee disagree: Culp, Selected Problems in Multistate Taxation, 44 Iowa L. Rev. 280, 292-93 (1959); Brief of Conference of Mayors, p. 28, and Appellant's Brief, p. 44, in Vol. 99, #548, Record in

Travis case, *supra*. Both devices are intended to cover personal expenses, not business expenses.

Appellee asserts that personal expenses of nonresidents are likely to be in proportion to income not taxed by the state. If the premise is true, the state should apportion personal deductions as well as business deductions and income, and allow a nonresident taxpayer to deduct from his Oregon taxable income that proportion of his personal, nonbusiness deductions allowed to residents as his Oregon taxable income bears to the taxable income from all states. That is the method adopted by Georgia. Ga. Code Ann. Sec. 92-3112(d)(1935). Oklahoma allows apportioned deduction of medical expenses by nonresidents. 68 Okl. Stat. Ann. Sec. 880(j).

Appellant consistently urged a policy of apportionment before the lower courts (App. Br. 5, 7, 10-13; R. 5; A. 5). Professor Culp seems to agree that apportionment is the sound and reasonable approach. 44 Iowa L. Rev. at 292-93. ORS 316.360 is broad enough to allow such a construction. In other words, apportionment establishes the necessary connection with income, within the terms of the statute. The State clearly can require such apportionment. See *McCutchan* v. *Oklahoma Tax Comm.*, 191 Okla. 578, 132 P.2d 337 (1942). Cf. *Shaffer* v. *Carter*, 252 U.S. 37, 57, 40 S. Ct. 221, 227, 64 L. Ed. 445, 458-59 (1920).

The reasoning of the *Shaffer* case with respect to deduction of business losses would apply with equal force to personal, nonbusiness deductions. If a state taxes part of a nonresident's personal income, it must

allow him a proportionate amount of the personal, nonbusiness deductions allowed to resident taxpayers.

Appellee suggests the possibiilty that a nonresident may take the same deductions twice in different states. The same possibility exists with personal exemptions, but the Court required nondiscrimination nevertheless. *Travis* v. *Yale & Towne Mfg. Co., supra,* 252 U.S. at 81-82, 40 S. Ct. at 232-33, 64 L. Ed. at 470.

Appellee also gives a strange example of how a nonresident could avoid any Oregon tax by the daring expedient of borrowing money at 6% interest and investing it at the same rate (Mot. Dis. 9-10). On the facts stated, the nonresident would not have any real income anywhere to be taxed; the transaction is an economic wash.

The tax-avoiding nonresident taxpayer feared by the State of Oregon would be properly taxed if the State would simply require apportionment of personal deductions.

CONCLUSION

The statutory discrimination against nonresidents here involved is admittedly unrational and unfair, and it is a general discrimination against a large class of persons. There is a need for an announced requirement of apportionment of personal deductions.

Appellee's construction of the Oregon Admission Act is unsound and in conflict with the construction given the Act by the Oregon Tax Court. The need for this

Court's construction of the various statehood acts is apparent.

This Court should fully examine the constitutional questions on the merits with briefs and oral argument.

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July 29, 1965